The court noted that under Rule 3, F. R. C. P., "A civil action is **commenced** by filing a complaint with the court" (emphasis added). When it is considered that 15 U. S. C. 15b was enacted some seven years after the effective date of the F. R. C. P., the statutory use of the word "commenced" is of controlling import. In this connection, the court below relied also upon the legislative history of 15 U. S. C. 15b and of Rule 3, F. R. C. P. That history is significantly ignored by petitioner here.

But this Court has recently set the guiding standards under which the tolling of a federal statute of limitation is to be determined. Under **Burnett v. New York Central Railroad Co.**, 380 U. S. 424, the pivotal question here is "one 'of legislative intent'" (l. c. 426).

As pointed out by the court below, the legislative history of 15 U. S. C. 15b "indicates that Congress intended to require only the filing of a complaint to toll the running of the statute" (347 F. 2d 921, l. c. 925). Senate Report No. 619, June 21, 1955, to accompany H. R. 4954, which became 15 U. S. C. 15b, states:

> "The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to **institute suit.** It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and **file his complaint.**" (84th Congress, First Session, 1955, U. S. Code, Congressional and Administrative Laws, p. 2333. Emphasis added.)

In the instant case, the **complaint** having been filed on October 23, 1961, the action was commenced on that day, and the statute of limitation was thereby tolled.

No restrictive construction of the clear, plain and specific mandate of 15 U. S. C. 15b would be warranted if

consideration is given to the basic aims of the Congressional policy regarding private antitrust actions. As this Court has repeatedly admonished, from **Bruce's Juices, Inc. v. American Can Co.**, 330 U. S. 743, 751, to **Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.**, 381 U. S. 311, 14 L. Ed. 2, 405, 411:

> "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for the effective enforcement of the antitrust laws."

Accordingly, this Court held in these cases that the remedial purposes and policy-serving objectives of the antitrust laws should be effectively implemented rather than narrowly restricted by judicial construction.

Likewise significant is the legislative history of F. R. C. P. 3. As summarized in **Messenger v. United States**, 231 F. 2d 328 (C. A. 2, 1956), suggestions were made that the action abate if service of process was not obtained within sixty days, but

> "In the end, however, no time was specified for the service of process, the Advisory Committee noting that the motion sanctioned by Rule 41 (b) provided 'a method available to attack unreasonable delay in prosecuting an action after it has been commenced.' See Report of the Advisory Committee Containing Proposed Rules of Civil Procedure, p. 4 (April, 1937)." 231 F. 2d 328, 329.

The innovating purpose and effect of the F. R. C. P. to dispense with the additional requirement of due diligence in order to toll statutes of limitation are likewise recognized and applied in **Isaacks v. Jeffers**, 144 F. 2d 26, 28 (C. A. 10, 1944), cert. den. 323 U. S. 781.

Contra to the clear and unambiguous language of Section 15 U. S. C. 15b and of Rule 3, F. R. C. P., contra to

the explicit mandate of their legislative history, contra to the basic aims of the underlying Congressional policy, stands the bold assertion of petitioner. In a sweeping statement, petitioner flatly contends that nothing contained in these controlling yardsticks—all carefully and pointedly set out in the opinion below—indicates the abandonment of the old rule of **Linn & Lane Timber Co. v. United States**, 236 U. S. 574, 578, and that 15 U. S. C. 15b is not tolled by filing the complaint, but only upon service being effected with reasonable diligence (Petition, p. 11).

Significant here, is the admonition of this Court in **Goldlawr v. Heiman**, 369 U. S. 463, also a private antitrust case:

> "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure" (l. c. 467).

Although that case was primarily concerned with Section 1406, Title 28, U. S. C., the Court had before it also the matter of limitation:

> "Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake * * *" (l. c. 466).

The Court considered as overriding

> "the interest of justice * * * that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities'" (l. c. 467).

In **Goldlawr** venue was improper; here service was improperly effected. Both cases stem from a mistake in the applicable procedure. If there is some distinction between the two situations, it would be one without meaningful difference. Since the interest of justice required that the plaintiff in **Goldlawr** should not be penalized by the technicalities surrounding venue, the same interest of justice should require that the plaintiffs here should not be penalized by the technicalities surrounding the quantum of doing business necessary to serve a non-resident defendant (compare **Goldlawr**, supra, l. c. 466, footnote 11), which is the prerequisite for the applicability of 15 U. S. C. 22.

Again, in **Ragan**, supra, this Court pointed out that in a case to enforce rights under a **federal statute** as here the suit is properly commenced by the filing of the complaint, whereas a different rule may be recognized in **diversity** cases, if so required by the pertinent state law.

This critical dichotomy is overlooked in the present petition, as it was by District Judge Meredith. He cited as the solitary authority for his decision **Hixon v. Highsmith**, 147 F. Supp. 801 (D. C. Tenn., 1957). That was not a case resting on a federal statute, but was a **diversity** case. It was decided by Judge Robert L. Taylor in application of a Tennessee and not of any federal statute of limitation. Judge Taylor followed his prior decision in **West v. Cincinnati, N. O. & T. P. Ry. Co.**, 108 F. Supp. 276 (1952), another **diversity** case where he expressly considered himself bound to follow Tennessee law, in compliance with **Ragan** (l. c. 278).

Petitioner, however, continues to rely on the **Hixon** and **West** cases (Petition, pp. 9, 10) and similar decisions of district judges who followed the state law applicable in those cases, which under **Ragan** was binding upon

them: **Dill v. Scuka**, 198 F. Supp. 808, 811 (D. C. Pa., 1961); **L. G. Defelice & Son, Inc. v. Globe Indemnity Company**, 23 F. R. D. 275 (D. C. N. Y., 1959); **Wagner v. New York, Ontario and Western Railway**, 146 F. Supp. 926 (D. C. Pa., 1956); **Hukill v. Pacific and Arctic Railway and Navigation Co.**, 159 F. Supp. 571 (D. C. Alaska, 1958); and **Hoffman v. Wair**, 193 F. Supp. 727 (D. C. Oregon, 1961), cited at pages 10 and 9 of the Petition. Other cases relied upon by petitioner were decided before **Ragan**, but were likewise based on diversity and applied state law: **Yudin v. Carroll**, 57 F. Supp. 793, 798 (D. C. Ark., 1944) and **Schram v. Holmes**, 4 F. R. D. 119 (D. C. Mich., 1943), cited at page 9 of the Petition.

Thus, under all applicable precedents, the court below was correct in concluding that no reasonable basis exists for engrafting either upon 15 U. S. C. 15b or upon Rule 3 the condition that summons be served with diligence. If Congress or the rulemakers had intended to impose such condition, it would have been a simple matter to say so, as some state statutes have chosen to provide (347 F. 2d, l. c. 925).

II.

The Decision Below Is in Harmony With the Spirit of the Decisions of This Court.

Petitioner to the contrary notwithstanding, the general trend of this Court's pronouncements in **Goldlawr** and **Ragan** on the one hand, and in **Burnett** and **Minnesota Mining & Mfg. Co.** on the other, appears to support the decision below both as to the literal construction of the statutory provisions involved here, and as to the broad aims of the Congressional policies and purposes to be liberally effectuated, rather than narrowly circumscribed.

In particular, in **Burnett**, this Court reviewed federal and state* statutory provisions enacted in recognition of "the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run" (380 U. S., l. c. 430). The same underlying principle should govern the situation at bar, where the action was commenced well within the limitation period, and petitioner had actual notice.

No support for petitioner's contention can be found in **Bates Manufacturing Company v. United States**, 303 U. S. 567, or in **Herb v. Pitcairn**, 325 U. S. 77, cited at page 8 of the Petition. **Bates** was decided in 1938 and concerns a complaint filed in 1929—long before the enactment of the F. R. C. P. In any event, the statute of limitations there under consideration was held tolled by the filing of the complaint, although service was effected some time after the limitation had expired. The **Pitcairn** case was primarily concerned with state law and, therefore, is consistent with the rule of **Ragan**, which supports the position of respondents here.

Petitioner purports to invoke the equitable rule that prohibits tolling by dilatory action (Petition, p. 7) and contends that "Failure to enforce a statute of limitation because of a technicality can have an equally unfair impact upon innocent defendants" (Petition, p. 11). To buttress its plea for equitable relief, petitioner asserts that it "has been confronted with a loss of material records, in respondents' possession, which occurred during the period **after the statute of limitation had run**" (Petition, p. 14, emphasis added).

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* In this connection, it may be noted that Missouri has a one year "saving" statute, namely, Section 516.230, R. S. Mo. 1959, providing relief, when plaintiff suffers a nonsuit after having commenced his action within the limitation period.

Petitioner is patently in error, and is in flagrant contradiction of the record. The affidavit of counsel for petitioner filed in support of its Motion for Summary Judgment avers that "water leakage in plaintiff's store room in the Spring of 1962 destroyed a substantial part of the records in question" (R. 33). In the Spring of 1962 the four year statute of limitations had not run, since the charges of the complaint cover the period October 23, 1957-September 1, 1959 (R. 23-24).

Nowhere in the Petition is it contended—nor could it be—that petitioner lacked actual notice of the complaint and of its filing. Not only did petitioner file its Motion to Quash and Dismiss for lack of jurisdiction on November 8, 1961 (R. 4), but petitioner's counsel attended the February 23, 1963 setting, at which he heard original counsel for respondents make "some statement about securing service" and asking "that the case be passed" (R. 34-35). Again, petitioner's counsel filed its Brief Amicus Curiae opposing respondents' motion to vacate the order of dismissal (R. 17-19).

On this record, petitioner cannot be heard to claim "surprise" (Petition, p. 12) within the scope of the **Burnett** rule. To the contrary, the record is conclusive that petitioner had actual full notice of the exact dimensions of this claim long before the statute of limitation had run. If ever there was a "hard case" for the application of the equitable principle invoked by petitioner, it is the case at bar.

III.

There Is No Conflict of Decisions Between Circuits.

The decision below poses no threat to the goal of uniformity of federal procedure. Petitioner has been unable

to find a single decision of a Circuit Court of Appeals which holds in accordance to its contention. To the contrary, the decision below finds support in a number of decisions of the other circuits:

Ninth Circuit:

Rollins v. United States, 286 F. 2d 761 (1961);

Second Circuit:

Bomar v. Keyes, 162 F. 2d 136 (1947), cert. den. 332 U. S. 825;

Tenth Circuit:

Isaacks v. Jeffers, 144 F. 2d 26, 28 (1944), cert. den. 323 U. S. 781;

Sixth Circuit:

Mohler v. Miller, 235 F. 2d 153, 155 (1956).

Thus, petitioner's claim of "confusion" in the federal practice is plainly unsupported at the appellate level. It is hardly true even at the district court level, since most of the decisions relied upon by petitioner involved diversity cases, were ruled under state law, and, under **Ragan**, are inapplicable here, see supra, pp. 9, 10.

The only case cited by petitioner (Petition, p. 9) which applied federal law is **Fistel v. Christman**, 13 F. R. D. 245 (D. C. Pa. 1952). On its facts, even that case hardly supports petitioner's contentions. The court there noted that plaintiff "failed to give directions to the Marshal to serve defendant for almost two months", then for over six months next plaintiff refrained from having defendant served although plaintiff knew or could easily determine defendant's addresses. Critical here is the court's notation that "**Plaintiff knew** that extraterritorial service was available in this type of suit because in a similar action he

had filed against defendant in the District Court * * * of New York process had been served upon defendant * * * in * * * Pennsylvania" (13 F. R. D., l. c. 247, footnote 2; emphasis added). Clearly none of these facts is present in the case at bar. See opinion below 347 F. 2d, l. c. 924, and compare Judge Meredith's opinion (R. 38-39).

In harmony with the decision below are the following typical district court decisions: **Ingravallo v. Pool Shipping Co.**, 247 F. Supp. 394, 399 (D. C. N. Y., 1965); **Huffmaster v. United States**, 186 F. Supp. 120, 122 (D. C. Cal., 1960); **Fleming v. Weisberg**, 7 F. R. D. 47 (D. C. N. Y., 1947); **Davis v. Flemming**, 23 F. R. D. 139, 142 (D. C. Mo., 1959), and **Mahan v. Ohio Auto Rental Co.**, 207 F. Supp. 383, 384 (D. C. Ohio, 1962). Compare **Sylvestri v. Warner & Swasey Co.**, 244 F. Supp. 524 (D. C. N. Y., 1965).

Thus, in support of petitioner remain some casual dicta, and general language by some textwriters, mostly prior to, or otherwise overlooking the rule established in **Ragan**. In none of the textbooks cited by petitioner is there any reference whatsoever to 15 U. S. C. 15b, which is the statute controlling here. Typical is petitioner's citation (p. 10) to 6 Toulmin's Anti Trust Laws, § 5.9, pp. 194-195. Petitioner omits any reference to the date of the cited book, namely, 1951—some five years before Section 15b came into force.

IV.

The Decision Below May Be Supported Upon Another Dispositive Ground.

Although holding that the issue of diligence was not properly before Judge Meredith because of the controlling provisions of 15 U. S. C. 15b and of Rule 3, F. R.

C. P., the court below noted that (1) the original summons was delivered to the marshal for service on the same day the complaint was filed, (2) there is no evidence of any affirmative action on the part of respondents to obstruct the officers in the performance of their duties imposed upon them by F. R. C. P. 4, and (3) there has been no unreasonable delay at least subsequent to the time when the dismissal for want of prosecution was set aside (347 F. 2d, l. c. 924). The court, however, held that since "diligence in serving process is not a material issue in this case, we do not reach the question of whether under the present record the court would be justified in finding a lack of diligence in this respect" (347 F. 2d, l. c. 925).

Not only was no motion under Rule 41 (b), F. R. C. P., before Judge Meredith, as pointed out by the court below, but under the record in this case, Judge Meredith would have abused his discretion in sustaining such motion, or so ruling sua sponte—which he did not purport to do.

The issue of due diligence involving respondents' original counsel had been **five times** before Chief Judge Harper, a judge of equal jurisdiction, who presided over the case until the last assignment by rotation to District Judge Meredith, another judge in the same court. Judge Harper considered the issue of diligence on the following occasions: **first**, on February 23, 1963, when he passed the case after his attention had been called to the fact that there had been no valid service, and respondents' counsel explained his efforts to have it accomplished (R. 34-35); **secondly**, Judge Harper ruled on this point when he dismissed the action "for failure to prosecute" on September 14, 1963 (R. 11); **thirdly**, on September 23, 1963, when he amended the order to read "without prejudice" (R. 12); and **fourthly**, on December 13, 1963,

when he overruled petitioner's contentions, set aside his order of dismissal for failure to prosecute, and reinstated the cause to the docket (R. 20). **Fifthly**, on January 10, 1964, Judge Harper granted leave to respondents to file their amended complaint (R. 20).

The record is crystal clear that respondents' original inability to obtain valid service, the reasons therefor, and the justification for the proper vehicle eventually adopted were fully and repeatedly presented and argued by respondents, contradicted by petitioner, and adjudicated by Judge Harper. Having presided over the case from its inception, having heard the arguments on the petitioner's Motions to Quash Service and to Dismiss for Lack of Jurisdiction, and a number of informal matters, Judge Harper was in a peculiar position to acquire the feel of the case and exercise his discretion upon a proper evaluation of the actions and inactions of the parties.

Judge Harper's final determination on that issue, which petitioner chose not to challenge by direct action while that judge was presiding over the case, could not be reversed by another judge of equal jurisdiction. This is the situation and holding in **Rollins v. United States**, 286 F. 2d 761 (C. A. 9, 1961), which involves strikingly similar facts and procedures.

Time and again, this Court has admonished against forum-shopping. Certainly, it should not be countenanced when a choice may be offered between judges of the same federal district.

As the law of the case, Judge Harper's ruling could not be overruled in the same case by a judge of co-ordinate jurisdiction, in the absence of exceptional circumstances, none of which exists in this case. **Plattner Implement Co. v. International Harvester Co.**, 133 F. 376 (C. A. 8, 1904);

Hardy v. North Butte Mining Co., 22 F. 2d 62 (C. A. 9, 1927); **Pickwick-Greyhound Lines v. Shattuck**, 61 F. 2d 485 (C. A. 10, 1932); **TCF Film Corporation v. Gourley**, 240 F. 2d 711 (C. A. 3, 1957); **United States v. Wheeler**, 256 F. 2d 745 (C. A. 3, 1958), cert. den. 358 U. S. 873, 358 U. S. 913, 363 U. S. 828; and **Lincoln National Life Ins. Co. v. Roosth**, 306 F. 2d 110 (C. A. 5, 1962), cert. den. 372 U. S. 912.

The "most compelling circumstances" which, according to **Lincoln National Life Ins.**, and similar precedents, would justify a departure from this "salutary" rule, relate to clear errors of law, not to matters of discretion on the part of the judge who made the original adjudication. Here, the converse is true. A clear error of law was committed by Judge Meredith when he found negligence on respondents' part in not obtaining service upon petitioner through the Secretary of State of Missouri under R. S. Mo., Section 351.630 (237 F. Supp., l. c. 819).

Respondents pointed out in the court below, without any challenge by petitioner, that Section 351.630, R. S. Mo. 1959, never had any possible application to the instant case. Prior to its 1961 amendment, the Section was concerned with service upon the Secretary of State in three hypotheses, all concerning foreign corporations "authorized to transact business in this state" or whose certificate of authority to do business had been forfeited. But petitioner was not qualified to do business in Missouri and had no office in the State of Missouri, as averred by petitioner in its Motion to Quash the original service and supporting affidavit (R. 4-7). The point could not be controverted by the petitioner and was never open to question.

As amended by the 1961 Laws of Missouri, pp. 257-8, Section 351.630 permits service upon the Secretary of

State whenever a foreign corporation commits a tort, in whole or in part, in Missouri. This "implied consent" statute, however, was held by the Supreme Court of Missouri in **State ex rel. Clay Equipment Corp. v. Jensen,** 363 S. W. 2d 666 (en banc, 1963), as inapplicable "to the commission of torts which predate the effective date of the Act" (l. c. 670) and to be merely "prospective in its application" (l. c. 672). Since the present action concerns torts committed prior to September 1959 (R. 23-24), it is conclusive that the "implied consent" statute was never available to respondents.

Not only was the statute inapplicable here, but by the later decision in **State of Missouri ex rel. M. Pressner and Company, Inc., and Jeryco Plastics Corporation v. Honorable Michael J. Scott, Judge of the Circuit Court of the City of St. Louis,** 387 S. W. 2d 539 (Mo. Sup. 1965), it was held in violation of the due process requirements. This is a unanimous opinion (concurred in also by Missouri Supreme Court Judge James C. Finch, who, before his elevation to the bench, had represented the petitioner in these proceedings at the district court level, and had urged the availability of this statute as a ground for respondents' alleged negligence).

It is thus clear that Judge Meredith erred in blaming respondents for their failure to resort to an inapplicable and unconstitutional statute. On the facts and on the law, he abused his discretion in overruling Judge Harper. Thus, the decision below may be also supported on this separate ground.

V.

There Is No Important Question of Federal Law.

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one

warranting review by this Court on certiorari. No conflict of decision between circuits is even remotely involved. Nor is there any real conflict between the decisions of the district courts when petitioner's citations are analyzed in the light of the critical distinction between cases resting on federal statutes, on the one hand, and on diversity of citizenship on the other.

Most importantly, the trend of this Court's decisions lends support to the decision below, which is bottomed on a particular federal statute and rests on a highly particular set of facts. On these individual facts the decision of the court below is manifestly correct. Nor, in the light of the legislative history of the enactments pertinent here, could any other result be reached.

Furthermore, that result may be supported upon a ground which the court below did not deem necessary to pass on. This ground rests on uniform and time-honored precedents that restrict forum-shopping and overruling of decisions by judges of concurrent jurisdiction in the same court among the same parties in the same case.

The unique set of facts and procedural circumstances present here make that rule of particular applicability to this case. These facts and circumstances are hardly likely to be duplicated, far less to blossom into a pattern of general occurrence and interest.

Manifestly, there is no important question of federal law requiring decision by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 11, 1966.

APPENDIX A.

Statutes and Rules Involved.

1. Federal Statutes.

In its pertinent provision, 15 U. S. C., Section 15b provides:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. * * * Oct. 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283.

15 U. S. C., Section 22 provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. Oct. 15, 1914, c. 323, § 12, 38 Stat. 736.

28 U. S. C. 1391 (c) provides:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

28 U. S. C., Rule 3 F. R. C. P. provides:

> A civil action is commenced by filing a complaint with the court.

28 U. S. C., Rule 41 (b) F. R. C. P. provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

2. Missouri Statutes.

Section 351.630, R. S. Mo. 1959, provides in its pertinent part:

> 1. Service of process in any suit, action, or proceeding, or service of any notice or demand required or permitted by law to be served on a foreign corporation may be made on such corporation by service thereof on the registered agent of such corporation. Whenever any foreign corporation authorized to transact business in this state shall fail to appoint or maintain in this state a registered agent upon whom service of legal process or service of any such notice or demand may be had, or whenever any such registered agent cannot with reasonable diligence be found at the registered office in this state of such corporation, or whenever the certificate of authority of any foreign corporation shall be forfeited, then and in every such case the secretary of state shall be irrevocably authorized as the agent and representative of such foreign corporation to accept service of any process, or service of any notice or demand required or permitted by law to be served upon such corporation. Service on the secretary of state of any such process, notice, or demand against any such foreign corporation shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice, or demand. In the event that any process, notice or demand is served on the secretary of state, he shall immediately cause a copy thereof to be forwarded by

registered mail, addressed to such corporation at its principal office as the same appears in the records of the secretary of state.

Laws of Missouri, 1961, p. 257, repealed Section 351.630, R. S. Mo. 1959, and enacted new provisions, the pertinent subsections of which read as follows:

2. If a foreign corporation commits a tort, excepting libel and slander, in whole or in part in Missouri against a resident or non-resident of Missouri, such acts shall be deemed to be doing business in Missouri by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of state of Missouri and his successors to be its agent and representative to accept service of any process in any actions or proceedings against the foreign corporation arising from or growing out of the tort. Service on the secretary of state of any such process shall be made by delivering to and leaving with him or with any clerk having charge of the corporation department of his office, duplicate copies of the process. The committing of the tort shall be deemed to be the agreement of the foreign corporation that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served personally within the state of Missouri.

3. In the event that any process, notice, or demand is served on the secretary of state, he shall immediately cause a copy thereof to be forwarded by registered mail, return receipt requested, addressed to the secretary of such corporation at its principal office as the same appears in the records of the secretary of state.

This statute was further amended in 1965, S. B. 106, Section 1, but this amendment was enacted after Judge

Meredith's decision of October 30, 1964, and is therefore immaterial here.

Section 516.230, R. S. Mo. 1959, provides:

> If any action shall have been commenced within the times respectively prescribed in sections 516.010 to 516.370, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff, or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 684

SID RICHARDSON CARBON & GASOLINE CO.,
Petitioner,

v.

THE MOORE COMPANY OF SIKESTON, MISSOURI, AND J. E. MOORE, JR.,
Respondents

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and
The Associate Justices of the
Supreme Court of the United States:

Petitioner, Sid Richardson Carbon & Gasoline Co., respectfully requests a rehearing of its Petition for

a Writ of Certiorari refused by order of this Court on February 28, 1966, and as grounds therefor says:

I. *Grounds relied upon by the Court of Appeals in its decision below and by respondent in its brief filed herein in opposition to the Petition for Writ of Certiorari involve the deprivation of procedural due process of law to Petitioner.*

A. Consideration of orders of the District Court entered before Petitioner was served with summons depriving petitioner of a right to be heard violates Constitutional requirements of due process of law.

B. Tolling of a statute of limitations by *ex parte* action is inconsistent with due process.

ARGUMENT

The District Court found that plaintiffs lacked diligence in securing service of summons upon defendant. The Court of Appeals held that the question of diligence was immaterial, and that mere filing of the complaint was sufficient to toll the statute of limitations.

In its opinion and in the Brief in Opposition to Petition for Writ of Certiorari filed herein by Respondents, reliance is had upon orders of the District Court restating plaintiffs' cause, after dismissal, and permitting amendment of the complaint. Such orders

were entered by the District Court prior to service upon petitioner, and to hold such orders efficacious in denying the right of this petitioner to urge want of diligence by Respondents violates the fundamental premise of due process of law for litigants.

In *Armstrong v. Manzo*, ____ U.S. ____, 14 L.Ed. 2d 62, 66, 85 S.Ct. ____, this Court made the following significant statement:

> "A fundamental requirement of due process is 'the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L.Ed. 1363, 1369, 34 S.Ct. 779. It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

Without the necessity of entering into a discussion of the procedural-substantive dichotomy concerning statutes of limitations, it is sufficient to state that statutes of limitations are enacted in the interests of fairness to defendants. To deprive a defendant of the protection of such statutes without regards to diligence of the plaintiff, by tolling the statute by mere filing of a complaint, is contrary to principles of fairness and inconsistent with the broad definition of due process of law which has been championed by this Court.

As stated in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.

Ed. 565, 572, such action is "contrary to the first principles of justice."

II. *A conflict of decisions between circuits has arisen subsequent to the filing of the Petition for a Writ of Certiorari.*

ARGUMENT

The Court of Appeals of the Ninth Circuit, in *Pearson v. Dennison*, 353 F. 2d 24, considered a case similar to the instant case in which there had been a dismissal for want of prosecution, reinstatement, and a subsequent dismissal for lack of diligence in prosecution. Unlike the Court of Appeals in the instant case, the Ninth Circuit held that the prior reinstatement did not become "the law of the case" and that the District Court, on its own motion, could dismiss for want of diligence in prosecution.

III. *The Brief in Opposition to Petition for Writ of Certiorari filed by Respondents Contains Substantial inaccuracies.*

STATEMENT

Respondents have presented inaccurately several material matters.

At page 2 of Respondents' Brief, it is represented that "another district judge in the same case had

previously overruled the identical contentions of the petitioner with regard to the alleged lack of diligence . . ." Such action was taken before petitioner had been served with process.

At page 3 of Respondents' Brief it is stated that petitioner's motion to quash service was sustained on the grounds that petitioner *was not subject to service of process in Missouri.* Judge Harper expressly overruled petitioner's motion to dismiss for lack of jurisdiction over the person, and left such question open. (Record p. 10-11).

This was not an instance of "forum-shopping" as alleged by Respondents at page 16. Judge Harper, as presiding judge had assigned the case to Judge Meredith. Judge Meredith decided the matter upon different facts and different questions than were considered by Judge Harper on any prior occasion. Judge Meredith's decision was the first such decision made after service of valid process upon petitioner.

CONCLUSION

The result sought by petitioner is in accord with the reasoning of prior decisions of this Court, and would remove the distressing uncertainties and conflicts into which lower courts have fallen.

Petitioner submits that the limitation statute in question, if not substantive in nature at least creates

a right of which a litigant should not be deprived without due process of law. The action of the Court of Appeals allows no other conclusion but that such statute may be tolled even in the absence of due process. Because the United States Court of Appeals for the Eighth Circuit erroneously considered that it was not bound by due process requirements, a rehearing of the petition for a writ of certiorari should be granted, and the United States Court of Appeals for the Eighth Circuit reversed.

Respectfully submitted,

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OF COUNSEL

CERTIFICATE

The foregoing Petition for Rehearing is presented in good faith and not for delay. It is restricted to substantial grounds available to petitioner although not previously presented to this court and to intervenning circumstances of substantial effect.

A copy of this Petition for Rehearing has been served upon Respondents by depositing copies of same, first class air mail postage prepaid, respectively addressed to Lashly, Lashly, Rava, Hyndman & Rutherford, Attorneys at Law, 705 Olive Street, St. Louis, Missouri, 63101, and to Weber Gilmore, Esq., Attorney a Law, 809 North Main, Sikeston, Missouri, 63801, Counsel of record for respondents.

Attorney for Petitioner